

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 BARBARA HEINRICH and GREGORY
4 HEINRICH,

5 Plaintiffs

6 v.

7 ETHICON, INC.; ETHICON LLC; and
8 JOHNSON & JOHNSON,

9 Defendants

Case No.: 2:20-cv-00166-APG-VCF

**Order (1) Granting in Part Defendants'
Motion in Limine No. 1 and (2) Denying
Plaintiffs' Motion to Amend**

[ECF Nos. 129, 146]

9 This case is one of many thousands of cases that were joined in multidistrict litigation
10 (MDL) in the United States District Court for the Southern District of West Virginia. The case
11 was transferred to this court for trial in January 2020. ECF No. 69.

12 The defendants filed a motion *in limine* to preclude evidence regarding fraudulent
13 concealment, equitable estoppel, or other doctrines related to tolling the statute of limitations.
14 The defendants contend this evidence is not admissible because the plaintiffs did not plead
15 tolling in their amended short form complaint, they withdrew their fraudulent concealment claim,
16 and fraudulent concealment was not pleaded with particularity under Federal Rule of Civil
17 Procedure 9(b).

18 The plaintiffs respond and move to amend if necessary. ECF Nos. 145, 146. They argue
19 that I should deny the defendants' motion because it does not identify what evidence the
20 defendants seek to exclude. The plaintiffs contend this is problematic because the same evidence
21 might support both the discovery rule and fraudulent concealment. The plaintiffs argue, for
22 example, that the representations the defendants made about their products are relevant to
23 whether Barbara Heinrich or her doctors knew or should have known that the product was

1 unreasonably dangerous. And they contend that, for their failure to warn claim, they have to
2 show the defendants knew of the hazards but failed to warn, so the defendants' representations to
3 physicians that the product was safe despite knowing of the hazards goes to when Barbara could
4 have learned about the defendants' knowledge.

5 The plaintiffs also argue that they withdrew the fraudulent concealment claim because the
6 MDL court ruled that all fraud claims were subsumed by the failure to warn claim and, at any
7 rate, fraudulent concealment as a claim is different than fraudulent concealment for tolling
8 purposes. They also argue that to the extent they failed to mark the discovery/tolling box on the
9 amended short form complaint, they should be allowed to amend because they checked the box
10 for discovery/tolling on the first short form complaint and then inadvertently did not do it on the
11 amended one. They also contend they were not allowed to plead with more particularity due to
12 the short form complaint process.

13 I grant the defendants' motion in part. The plaintiffs did not respond to the defendants'
14 arguments regarding equitable tolling or any other tolling doctrine other than fraudulent
15 concealment. I therefore grant the defendants' motion as to those doctrines. I also grant the
16 defendants' motion as to fraudulent concealment because the plaintiffs failed to plead it as
17 required and because I deny their untimely motion to amend to add it.

18 That being said, the evidence related to fraudulent concealment and other tolling
19 doctrines may overlap with evidence that is relevant to the discovery rule, which the defendants
20 concede is still at issue in this case. ECF No. 129 at 4 n.3. The defendants do not identify what
21 evidence they are seeking to exclude. I therefore cannot determine whether the evidence is
22 relevant to the plaintiffs' discovery rule arguments.

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1 **A. Equitable Tolling and Other Tolling Doctrines**

2 The defendants moved to exclude evidence relating to equitable tolling or other tolling
3 doctrines. The plaintiffs did not respond except to argue that fraudulent concealment is still at
4 issue in this case. I therefore grant as unopposed the defendants' motion to exclude evidence
5 related to equitable tolling or other tolling doctrines. LR 7-2(d). However, as discussed below
6 with respect to fraudulent concealment, the defendants have not identified what evidence they
7 are seeking to exclude. To the extent that evidence overlaps with evidence relevant to the
8 discovery rule, I do not exclude it. The defendants will have to object at trial to particular
9 evidence and questions.

10 **B. Dismissal of the Fraudulent Concealment Claim**

11 The original complaint contained both a fraudulent concealment claim and allegations of
12 fraudulent concealment for tolling purposes. ECF No. 57-13 at 18-24 (asserting claims for deceit
13 by concealment and fraud), 27 (alleging discovery rule and fraudulent concealment related to the
14 statute of limitations). I dismissed the fraudulent concealment claim at summary judgment after
15 the plaintiffs voluntarily withdrew it. ECF No. 86. The dismissal of the fraudulent concealment
16 claim has no impact on the allegations of fraudulent concealment for tolling. I therefore deny the
17 motion to the extent the defendants contend that dismissal of the fraudulent concealment claim
18 resulted in dismissal of fraudulent concealment for tolling purposes.

19 **B. Failure to Check the Box**

20 The original complaint contains fraudulent concealment allegations for statute of
21 limitations tolling purposes. In the MDL, Barbara Heinrich's original short form complaint
22 checked the box for discovery rule and tolling. ECF No. 1. Her and Gregory Heinrich's
23 amended short form complaint, however, did not. ECF No. 4.

1 Under both Nevada and federal law, “fraudulent concealment must be alleged with
2 particularity. The plaintiff must show the means by which previously unknown information was
3 acquired within the statutory period which led to discovery of the concealment” *Golden*
4 *Nugget, Inc. v. Ham*, 646 P.2d 1221, 1224 (Nev. 1982); *see also Conerly v. Westinghouse Elec.*
5 *Corp.*, 623 F.2d 117, 120 (9th Cir. 1980).

6 Because the plaintiffs did not check the tolling box on the amended short form complaint,
7 they have not alleged fraudulent concealment as a tolling doctrine in this case. They therefore
8 cannot rely on fraudulent concealment to toll the limitation period unless I grant their
9 concurrently filed motion to amend.

10 **C. Amendment**

11 The plaintiffs move for leave to amend and attach a proposed amended short form
12 complaint checking the box for discovery/tolling. ECF Nos. 146; 146-3. The defendants oppose,
13 arguing the plaintiffs have unreasonably delayed amendment. They contend there is no
14 explanation for the late amendment, especially where the defendants pointed out that the
15 plaintiffs had not checked the box months ago, but the plaintiffs did not move for leave to amend
16 until responding to this motion *in limine*. The defendants argue that amendment would prejudice
17 them because, based on the short form complaint, they have operated as if fraudulent
18 concealment was not at issue in this case. They also argue amendment would be futile because
19 there are no allegations that they engaged in intentional conduct directed at these plaintiffs that
20 deterred them from timely filing a claim. They argue silence is insufficient to support tolling
21 through fraudulent concealment.

22 In reply, the plaintiffs argue they made an oral motion to amend at the April 13, 2021
23 hearing, but that I did not rule on it. The plaintiffs contend that Nevada would allow a showing

1 of fraudulent concealment through intentionally withheld information. They also argue there are
2 allegations pleaded with particularity about the defendants withholding information from the
3 public and physicians.

4 Under Federal Rule of Civil Procedure 15(a)(2), I “should freely give leave [to amend]
5 when justice so requires.”¹ I consider five factors to assess whether to grant leave to amend
6 under Rule 15(a): (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility
7 of amendment, and (5) whether the plaintiff has previously amended the complaint. *Sonoma*
8 *Cnty. Ass’n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). Whether to
9 grant leave to amend under Rule 15 lies within my discretion. *Zivkovic v. So. Cal. Edison Co.*,
10 302 F.3d 1080, 1087 (9th Cir. 2002).

11 I deny leave to amend because the plaintiffs have previously amended, have unduly
12 delayed, and amendment would prejudice the defendants. The plaintiffs filed the amended short
13 form complaint in January 2014. That amendment added Gregory Heinrich as a plaintiff and
14 added a loss of consortium claim for Gregory, but it did not check the box for tolling even
15 though the prior short form complaint for Barbara had checked the box. More than seven years
16 passed during which time the plaintiffs did not notice their mistake. In that time, the parties
17 concluded discovery, briefed summary judgment, and were arguing about whether to bifurcate
18 trial when the issue was first raised before this court.

21 ¹ The parties do not address whether a scheduling order set a deadline to amend the pleadings in
22 this case. I will not search the record for one. I therefore do not address whether the plaintiffs
23 have met the stringent “good cause” standard under Federal Rule of Civil Procedure 16 for
amending the scheduling order. *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946,
952 (9th Cir. 2006); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir.
1992).

1 The plaintiffs do not explain their failure to notice the error even though the statute of
2 limitations was an issue at summary judgment, which the parties briefed in 2018. Additionally,
3 in February 2021, the defendants noted that the plaintiffs had not checked the tolling box on the
4 amended short form complaint. ECF No. 116 at 3, 8. That still did not prompt the plaintiffs to
5 move to amend until two months later, when they made an oral motion to amend during a
6 hearing on the motion to bifurcate the trial. ECF No. 129-2 at 18, 24-25. But as the plaintiffs
7 note, I did not rule on the plaintiffs' oral motion. *See* ECF No. 128. The plaintiffs still did not
8 seek leave to amend until a month later, and only then in response to the defendants' motion *in*
9 *limine*.

10 The defendants would be prejudiced if I allowed this late amendment. Because the box
11 was unchecked, the defendants may have assumed that fraudulent concealment was not an issue
12 for tolling purposes. The plaintiffs argue that the defendants are not prejudiced because they
13 conducted discovery on the substantive fraudulent concealment claim and because the parties
14 and the court have addressed this issue multiple times. But this court has not addressed
15 fraudulent concealment multiple times. The plaintiffs point to the summary judgment briefing,
16 but those briefs did not refer to fraudulent concealment for tolling purposes. Further, the
17 plaintiffs voluntarily withdrew their fraudulent concealment claim after the defendants argued it
18 was duplicative of a failure to warn claim. It is unclear what discovery the parties conducted
19 related to fraudulent concealment for tolling and the plaintiffs have not identified any.

20 In sum, under both federal and Nevada law, the plaintiffs were required to plead
21 fraudulent concealment for tolling purposes. They did not do so. It is too late for the plaintiffs
22 to amend to add fraudulent concealment for tolling the statute of limitations. I therefore deny the
23 motion to amend.

1 **C. What Evidence is Excluded**

2 Although I have denied amendment to add fraudulent concealment as a tolling theory,
3 there is likely to be significant overlap between evidence that might show fraudulent
4 concealment and that might be relevant to determining when the plaintiffs reasonably should
5 have discovered their claims. For example, if the defendants were reassuring physicians that the
6 device was safe and effective, that may aid the plaintiffs in explaining why none of Barbara
7 Heinrich's doctors were suggesting to her that there was a defect in the product as opposed to
8 normal complications from treatment for stress urinary incontinence. And if Barbara's doctors
9 told her she was experiencing normal complications, then the first-phase jury may find she
10 reasonably did not discover her claims earlier.

11 The defendants do not identify what evidence they specifically seek to exclude. I
12 therefore cannot determine what evidence may be relevant to the discovery rule versus
13 fraudulent concealment. As a result, the defendants will have to object to specific questions or
14 evidence at trial.

15 In relation to this issue, the parties have disputed what triggers a plaintiff's notice under
16 the discovery rule in Nevada. I addressed a similar dispute in *Young v. Ethicon*, No. 2:20-cv-
17 2018-APG-EJY, which is another case from the same MDL. There I stated that it was up to the
18 jury to decide whether the fact of the plaintiff's injuries following surgery would put her on
19 notice of her claims. *Young v. Ethicon*, No. 2:20-cv-2018-APG-EJY, ECF No. 101 at 3-6; *see*
20 *also Winn v. Sunrise Hosp. & Med. Ctr.*, 277 P.3d 458, 462-63 (Nev. 2012) (en banc). I see no
21 reason to depart from that analysis in this case.

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D. Conclusion

I THEREFORE ORDER that the defendants' motion *in limine* No. 1 (ECF No. 129) is **GRANTED in part.**

I FURTHER ORDER that the plaintiffs' motion to amend (ECF No. 146) is **DENIED**.

DATED this 1st day of November, 2021.



ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE